IN THE HIGH COURT OF BOMBAY AT GOA.

APPLICATION FOR APPOINTMENT OF ARBITRATOR NO. 6 OF 2004.

1. M/s. Shine Enterprise,
   a partnership Firm,
   o/at 140, Pant Nagar,
   Belgaum through its
   Partner Shri Sajeed
   Dessai, r/at F-2, BC
   Palm Groves, Tonca,
   Panaji.
2. Shri Sajeed Dessai,
   r/o F-2, BC Palm Groves,
   Tonca, Panaji. ... Applicants.

Versus

Union of India through
Central Public Works
Department, represented
by Executive Engineer,
o/at Nirman Vihar, Bambolim
Complex, Bambolim. ... Respondent.

Mr. S.S. Kantak with Miss R.M. Chodankar, Advocates for the Applicants.

Mr. V.P. Thali, Senior Central Government Standing Counsel for the Respondent.

Coram : P.V. HARDAS, J.

Date : 7th April 2004.

ORAL ORDER.

Undisputedly the agreement between the parties contains an arbitration clause for appointment of Arbitrator in the event of dispute between the parties. In pursuance to the dispute between the parties, the applicants by their letter, dated 10th October 2003, invoked the arbitration clause and requested the respondent to appoint an Arbitrator. Since the respondent had failed to appoint an Arbitrator, the applicants filed this application in this Court on 4th

February 2004 for appointment of an Arbitrator. During the pendency of this application before this Court, the respondent appointed an Arbitrator, by letter, dated 16th February 2004. On notice being issued by this Court, the respondent has filed his affidavit and in the affidavit two principal grounds with regard to the maintainability of the application have been made that (1) since the respondent has appointed an Arbitrator, the proceedings in this Court have become infructuous and (2) since the applicants have not followed the procedure for appointment of an Arbitrator, the request seeking appointment of an Arbitrator and the application under Section 11(6) of the Arbitration and Conciliation Act, 1996 is not maintainable.

2. Mr. Kantak, learned counsel appearing for the applicants, has placed reliance on various Judgments of the Supreme Court particularly **Konkan Railway Corporation Ltd. and others v. Mehul Construction Co.,** (2000) 7 S.C.C. 201; **Konkan Railway Corporation Ltd. and another v. Rani Construction Pvt. Ltd.,** (2002) 2 S.C.C. 388; **Datar Switchgears Ltd. v. Tata Finance Ltd & another,** 2001 (1) Bom.C.R. 778; **Naginbhai C. Patel v. Union of India,** 1999(2) Bom.C.R. 189 and the unreported Order of the learned Single Judge of this Court in Application for Appointment of Arbitrator No. 17 of 2001, dated 21st June 2001 (Dominic Isaac

Proprietor of M/s. Premier Builders, Engineers & Contractors v. Union of India).

3. Mr. Thali, the learned counsel appearing on behalf of the respondent, has fairly stated that the first objection of the respondent that since the respondent had already appointed an Arbitrator, this proceeding under Section 11(5) is rendered infructuous is not pressed by him. Turning to the second contention, it is submitted by Mr. Kantak, the learned counsel for the applicants, that whether the applicants have followed the procedure for appointment of an Arbitrator or not is an issue which can be squarely addressed to by the Arbitrator himself, who has the jurisdiction under Section 16 of the Arbitration and Conciliation Act. According to Mr. Kantak, the learned counsel for the applicants, this Court while exercising jurisdiction under Section 11(5) of the Arbitration and Conciliation Act cannot entertain the contentious issue and particularly issues which can fall for decision before the Arbitrator.

4. Mr. Thali, the learned counsel appearing for the respondent, has states that this application under Section 11(5) of the Arbitration and Conciliation Act is premature and is not maintainable as the applicants have not followed the proper procedure agreed to between the

parties for the appointment of an Arbitrator and, thus, according to Mr. Thali, there is no failure on the part of the respondent in appointing an Arbitrator so as to invoke the jurisdiction under Section 11(5) of the Arbitration and Conciliation Act.

5. Whether the applicants have followed the procedure or not is an issue which need not detain this Court in exercise of jurisdiction under Section 11(5) of the Arbitration and Conciliation Act. The jurisdiction of the Arbitrator under Section 16 of the Arbitration and Conciliation Act is very wide. Admittedly, during the pendency of this application, on the basis of the demand made by the applicants, an Arbitrator came to be appointed. Undoubtedly, since the applicants had already filed an application in this Court, the appointment of the Arbitrator during the pendency of this application is non est. According to me, the issue regarding the non-observance of the procedure by the applicants, which primarily is a contentious issue, cannot put fetters on the power of this Court under Section 11(5) of the Arbitration and Conciliation Act for appointment of an Arbitrator.

6. Since the parties have not mutually agreed on the name of the Arbitrator to be appointed, I, hereby, in exercise of powers vested under Section 11(5) of the

Arbitration and Conciliation Act, appoint Mr. Alvaro De Noronha Ferreira, retired District and Sessions Judge, as the Arbitrator to settle and decide the dispute between the parties. The parties to approach the learned Judge for settlement of the terms. The Arbitrator be informed at La Campala Colony, Miramar, Panaji, Goa, regarding his appointment.

7. Application is disposed of accordingly.

(P.V. HARDAS)
JUDGE.

ed's.